# Mistake as to Identity and the Threads of Objectivity

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Mistake as to identity during the contracting process has proved to be a fruitful source of academic debate for more than a century[1]. The typical scenario involves A selling goods to B, where B, by cunning artifice, persuades A that he is actually dealing with C. B then sells the goods onwards to X, an innocent third party who wishes to assert his title to the goods as against A. Armed with a series of seemingly contradictory judicial dicta, and presented with a range of factual scenarios, academic tutors have expected students to draw distinctions of extreme subtlety in order to determine whether the ensuing contract between A and B was void for mistake, or simply voidable for fraud. The ability to distinguish the substance of a person's identity from any severable attributes, and to comprehend the importance of the factual context in which negotiations took place, seemed pivotal to the proffering of justifiable, albeit speculative conclusions. However, such intellectual entertainment does little to serve the twin cornerstones of certainty and predictability upon which the international reputation of the English Law of Contract is based. Thus, in recently commenting on the state of the law in this area, Sedley LJ seemed justified in concluding:

> *"The illogical and sometimes barely perceptible distinctions made in earlier decisions, some of them representing an unarticulated judicial policy on the incidence of loss as between innocent parties, continue to represent the law."*[2]

In such circumstances the recent House of Lords' decision in *Shogun Finance Ltd v Hudson*[3] was eagerly anticipated. The facts were that B, a rogue, agreed to purchase a car from CV Ltd for approximately £22,250, subject to obtaining hire-purchase finance. B produced a driving licence in the name of Mr Patel. This licence was genuine but had been obtained unlawfully. CV Ltd faxed a

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1 *See Stoljar, Mistake and Misrepresentation, (Sweet and Maxwell, London, 1968), Ch.4; Goodhart, Mistake as to Identity in Contract, (1941) 57 LQR 228; Williams, Mistake as to Party in the Law of Contract, (1945) 23 Can Bar Rev 271 and 380; Wilson, Identity in Contract and the Pothier Fallacy, (1954) 17 MLR 515; Unger, Identity in Contract and Mr Wilson's Fallacy, (1955) 18 MLR 259; and, Hall, Some Reflections upon Contractual Mistake at Common Law, (1995) 24 Anglo-Am LR 493.*

2 *Shogun Finance Ltd v Hudson [2001] EWCA Civ 1000; [2002] QB 834 at [11].*

3 *[2003] UKHL 62, [2003] 3 WLR 1371.*

copy of the driving licence, plus all other personal details supplied by B, to Shogun Finance Ltd, the respondents. Shogun instituted a thorough credit reference search through various agencies, including a check on any county court judgments or bankruptcy orders registered against Mr Patel. This search produced a "credit score" that automatically resulted in acceptance of the finance proposal. Having decided that the signatures on the faxed copies of the driving licence and the agreement form matched, Shogun informed CV Ltd that the proposal was accepted. B subsequently sold the car for approximately £17,000 to Hudson, the appellant, who intended to use it in his recently established courtesy car business. At first instance the assistant recorder ruled that the 'contract' between Shogun and B was void for mistake of identity and therefore no title could pass to Hudson under s 27 of the Hire- Purchase Act, 1964.[4] The Court of Appeal, by a majority, rejected Hudson's appeal, employing a literal definition of the word "debtor" in s 27. However, in particular, the judgments of Dyson and Brooke L JJ are more noteworthy for their *obiter* comments on the confused state of the case-law surrounding mistaken identity.[5]

The House of Lords, by a simple majority (Lords Nicholls and Millett dissenting), rejected the appeal. The nature of the appeal[6] and the fact that their Lordships delivered separate speeches makes the task of distilling a common set of principles more conjectural. However, basic unanimity was achieved on the following propositions: (1) The issue in this appeal was essentially one of offer and acceptance,[7] (2) An objective appraisal of the facts will determine to whom an offer was made and by whom it was accepted,[8] (3) In face to face dealings it is, at the very least, a very strong presumption that the parties intended to deal with each other; ie their physical presence rather than any assumed identity,[9] and (4) The majority decision in *Ingram v Little* should be overruled.[10] There also appeared to be clear dissatisfaction with previous case-law that had emphasised the importance of distinguishing a person's identity from his attributes.[11] However, differences of opinion emerged when considering contracts concluded by written correspondence, irrespective of whether this had led to a formal written contract. Was the offer and acceptance concluded between the named parties, or the persons who actually wrote the letters and/or signed the final written contract? In particular, could the presumption with regard to face to face dealings be extended to all forms of communication, or should it be reversed where negotiations had been conducted, or the final signature appended, *inter absentes*?

Before considering these issues, it would appear apposite to examine briefly the provisions of Part III of the Hire Purchase Act 1964, which were, of course, at the centre of this case. We can then offer some tentative guidance on how the House of Lords' decision in *Shogun* has affected our general understanding of this troubled area of "mistaken identity".

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4 *As substituted by the Consumer Credit Act 1974, s 192(3)(a), Sch 4, para 22.*

5 *Shogun Finance Ltd v Hudson [2001] EWCA Civ 1000; [2002] QB 834 at [11] and [51] respectively.*

6 *See Lord Hobhouse [2003] UKHL 62; [2003] 3 WLR 1371 at [44], who was keen to stress that the appeal solely concerned the "application of this statutory provision to the facts of the case (no more, no less)."*

7 *See, for example, Lord Walker, ibid at [183].*

8 *Ibid at [6] per Lord Nicholls of Birkenhead, [46] per Lord Hobhouse, [65] per Lord Millett, [125] per Lord Phillips, and [183] per Lord Walker.*

9 *Ibid at [37] per Lord Nicholls, [67] per Lord Millett, [170] per Lord Phillips and [185] per Lord Walker.*

10 *[1961] 1 QB 31. See [2003] UKHL 62; [2003] 3 WLR 1371 at [110] per Lord Millett, [185] per Lord Walker, implicitly supported by Lord Nicholls at [22] and [36], and Lord Phillips at [147] and [170].*

11 *See, for example, [2003] UKHL 62; [2003] 3 WLR 1371 at [5] per Lord Nicholls and at [59] per Lord Millett.*

## 1. Part III of the Hire Purchase Act 1964

In the factual situation outlined at the start of this paper, the effect of mistaken identity on the 'contract' between A and B will have potentially serious implications for X: the ability of X to establish title will depend largely on whether the 'contract' between A and B was void or merely voidable. If the 'contract' between A and B is void, B will not acquire title and *prima facie* will not be able to transfer title to X: *nemo dat quod non habet*.[12] In such a situation A will be able to reclaim the goods. If, however, the contract between A and B is merely voidable, B will be able to transfer title[13] to X provided A has not already avoided the contract;[14] consequently, A will not be able to reclaim the goods.

If we move the factual postulate closer to the facts of *Shogun*, involving a hire purchase contract between A and B, it is clear that even if the contract is valid, B does not, initially at least, obtain title to the goods.[15] At this stage, adopting the *nemo dat* rule, B *prima facie* does not have the power to transfer title to the goods to X.[16] If, however, the goods involved are motor vehicles[17] B may be able to pass good title to X under Part III, Hire Purchase Act 1964,[18] provided X is a 'private purchaser'[19] who acts in good faith and without notice of the hire purchase agreement.[20]

Does it matter whether the hire-purchase 'contract' between A and B is either void or voidable? Can B still pass title to X? Although the Act is slightly ambiguous on this matter,[21] the generally accepted view has been that B cannot pass good title to X if the hire purchase 'contract' is either void or was voidable and has been avoided prior to the disposition to X.[22] Certainly this seems to be the better view of Part III, Hire Purchase Act 1964 when considered as a whole,[23] an approach that was adopted by the majority in *Shogun* where the 'contract' between A and B was void. Separately, Lords Nicholls and Millett proceeded on the basis that B could pass title under Part III, Hire Purchase Act 1964 where the hire purchase contract between A and B was merely voidable, albeit where it had not been avoided.[24] Therefore in *Shogun* it was vital to determine whether or not the putative contract was void.

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12 *Theoretically, the nemo dat exception contained in the Factors Act 1889, s 9 (substantially reproduced in Sale of Goods Act 1979, s 25), seems applicable, but to rely upon this exception B must have obtained possession of the goods with the consent of the A, a requirement unlikely to be satisfied where the 'contract' is void for mistake of identity: see Du Jardin v Beadman Brothers Ltd [1952] 2 QB 712, 718.*

13 *Assuming that, as between A and B, it was intended that property in the goods was to pass immediately to B: cf Sale of Goods Act 1979, s 17.*

14 *See s 23 of the Sale of Goods Act 1979, and its application in Car & Universal Finance Ltd v Caldwell [1965] 1 QB 525.*

15 *See, for example, Helby v Matthews [1895] AC 471.*

16 *Moreover, B is not someone who has "bought or agreed to buy" goods for the purposes of the Factors Act 1889, s 9: Helby v Matthews [1895] AC 471.*

17 *This term is defined in s 29(1) of the Hire Purchase Act 1964.*

18 *See, however, s 29(5).*

19 *Defined in s 29(2) of the Hire Purchase Act 1964; see also Stevenson v Beverley Bentinck [1976] 1 WLR 483.*

20 *See ss 27(1) and 27(2) of the Hire Purchase Act 1964. For the position where X is not a private purchaser, see s 27(3).*

21 *Cf the use of the word "a" in s 27(1) and the definition of debtor in s 29(4). If one wished to argue that B could pass good title to X where the hire-purchase 'contract' was void, one might refer to the legislative evolution of these provisions; see Davies, Wrongful Dispositions of Motor Vehicles – A Legal Quagmire [1995] JBL 36, 47-50.*

22 *See Guest, The Law of Hire Purchase, (Sweet & Maxwell, London 1966) at 769-770; Goode, Hire Purchase Law and Practice, 2nd ed, (Butterworths, London, 1970), at 619-620; Goode, Commercial Law, 2nd ed, (Penguin, London, 1995) at 477; and, Guest (ed), Benjamin's Sale of Goods, 6th ed, (Sweet & Maxwell, London, 2002), at 7-088. Compare also Brown, Commercial Law, (Butterworths, London, 2001) at 422.*

23 *See, in particular, s 29(1).*

24 *Cf the judgment of the Court of Appeal: [2001] EWCA Civ 1000; [2002] QB 834, especially at [6] and [35]. In Shogun it was common ground that if the contract was merely voidable, it had not been avoided prior to the sale to X (see, for example, [36]).*

## 2. The Role of Objectivity

A common thread permeating their Lordships' speeches in *Shogun* was the importance of objective factual analysis. Applying the standard rules of offer and acceptance was a *sine qua non* for determining whether the original hire purchase 'contract' could permissibly transfer title to the appellant. Lord Millett, in effect, accurately summed up the approach adopted by all his colleagues when saying:

> *"Whatever the medium of communication, a contract comes into existence if, on an objective appraisal of the facts there is sufficient correlation between offer and acceptance to make it possible to say that the impostor's offer has been accepted by the person to whom it was addressed".*[25]

The difficulty, of course, is to define precisely what "objectivity" means in contract formation. Clearly the term denotes an analytical process devoid of either party's concealed, subjective motives and expectations.[26] But from whose perspective?[27] Assuming that A makes an offer, how does one decide whether the offer has been made to B, or to C (the person who B claims to be)? Conversely, if B makes an offer to A, what relevant criteria should a court employ in determining whether A has accepted an offer from B that seemingly emanated from C? One option would be to view all the circumstances through the eyes of one of the contracting parties, A or B, and ask whether there had been an apparent exchange of offer and acceptance.[28] In the Court of Appeal, Dyson LJ considered the matter from B's perspective: "viewed objectively, should the rogue have interpreted the offer by the finance company as an offer to enter into the hire-purchase agreement with him or with Mr Patel?"[29]

### Objectivity: a party-based perspective?

One difficulty of interpreting the facts from one party's viewpoint is that B *knows* A believes he is dealing with C (which is why he practices his deception) whilst A assumes that he is making an offer to a named individual called C.[30] Although a reasonable person might not be imbued with that knowledge, it is inevitable that a judgment of A's apparent intentions, or B's apparent knowledge, will be coloured either by B's underlying motivation which seeks to "modify" A's intentions from the outset, or by A's innocent assumption that B and C are one and the same person.[31] In *Cundy v*

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25 *[2003] UKHL 62; [2003] 3 WLR 1371 at [81].*

26 *See, for example, Trentham Ltd v Archital Luxfer [1993] 1 Lloyd's Rep 25, 27, where Steyn LJ explicitly disregarded the "subjective expectations and unexpressed mental reservations of the parties."*

27 *Relevant literature on this issue includes Spencer, Signature, Consent and the meaning of the Rule in L'Estrange v Graucob [1973] CLJ 104; Howarth, The Meaning of Objectivity in Contract, (1984) 100 LQR 265; Vorster, Comment on the Meaning of Objectivity in Contract, (1987) 103 LQR 265; and, de Moor, Intention in the Law of Contract: Elusive or Illusory (1990) 106 LQR 632.*

28 *Traditionally one might consider how the promisee interpreted the promisor's intentions from the terms of the offer and the surrounding circumstances: see Goodhart, Mistake as to Identity in Contract, (1941) 57 LQR 228 especially at 231.*

29 *[2001] EWCA Civ 1000; [2002] QB 834 at [40].*

30 *See Lewis v Averay [1972] 1 QB 198, 208, where Megaw LJ questioned the efficacy of any test that depended "upon the view which some rogue should have formed, presumably knowing that he is a rogue, as to the state of mind of the opposite party to the negotiation, who does not know that he is dealing with a rogue".*

31 *It is possible to draw an analogy here with the business efficacy test adopted in The Moorcock (1889) 14 PD 64 in which terms are not implied on the basis of reasonableness, but by reasonable people possessing the known characteristics of the contracting parties.*

*Lindsay*,[32] for example, a rogue called Blenkarn had ordered goods from the plaintiff respondents, pretending to be Blenkiron, a reputable hotelier. The goods were dispatched to Blenkarn's actual address, the same road from which Blenkiron operated, and were immediately sold on to the defendant. In the House of Lords, Lord Cairns LC considered the intention of the plaintiff with regard to Blenkarn and concluded forcefully:

> *"Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, for an instant of time, rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or any contract whatever".*[33]

It is clearly arguable that this approach displayed an over-reliance upon the subjective intentions of the plaintiff. Indeed, in *Shogun*, Lord Millett criticised the apparently subjective nature of the enquiry,[34] preferring to ignore the plaintiff's actual state of mind, induced by the fraud, and concentrate exclusively on whether a "sufficient correlation" existed between the offer and the acceptance.[35] It is difficult to find fault with such sentiments. Although courts strive to give effect to the parties' intentions, such intentions must be apparent, not merely held, otherwise we are in danger of substituting true consensus (ie of both parties) with an imposed consensus by just one party. This danger remains conspicuous when applying an objective test through the eyes of one or other party. Howarth, in considering "promisor objectivity" and "promisee objectivity" within the wider context of unilateral mistake, rightly cautioned that either method might produce a result more attuned to the parties' intentions but that one of the party's, more subjective, interpretation was bound to dominate in practice. Indeed, in the context of mistaken identity, other analytical flaws begin to emerge. First, if one adopts A's viewpoint, it is difficult to visualise circumstances where A would intend to deal with B. For example, in *Ingram v Little*, the Court of Appeal was faced with a very different set of facts in which the plaintiff had sold her car, after face-to-face negotiations, to a rogue masquerading as a Mr Hutchinson of Caterham. Devlin LJ, in a strongly worded dissenting judgment, criticised certain subjective aspects of the supposed "objective test", clearly adopted in *Cundy*, along the following lines:

> *"If Miss Ingram had been asked whether she intended to contract with the man in the room or with Mr P G M Hutchinson, the question could have had no meaning for her, since she believed them both to the one and the same. The reasonable man of the law – if he stood in Miss Ingram's shoes – could not give any better answer".*[37]

As Devlin LJ would have realised, such speculation simply generates a self-fulfilling prophecy as A would never consider the possibility that he was dealing with the wrong person, a point fully endorsed by Lord Walker in *Shogun*.[38]

Secondly, if one adopts B's viewpoint, taking account of his intended deception, it is generally inconceivable that he would assume A wanted to deal with him (B), a fact that prompted B to act

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32 *(1878) 3 App Cas 459.*

33 *Ibid at 465.*

34 *[2003] UKHL 62; [2003] 3 WLR 1371 at [91].*

35 *Ibid at [76], repeated at [81], [92] and [93]. Note the similarity with the Principles of European Contract Law (Art 2:101) which requires a test of "sufficient agreement" between the parties.*

36 *Op cit Howarth at 273.*

37 *[1961] 1 QB 31, 65 (emphasis added). Use of promisee objectivity clearly lay at the heart of the majority decision in Ingram; see Sellers LJ at 53-54 and Pearce LJ at 55.*

38 *See [2003] UKHL 62; [2003] 3 WLR 1371 at [184].*

fraudulently in the first place.[39] This was certainly the view of Hannen J in *Smith v Hughes* where B's knowledge of A's mistake led to the conclusion that "he [B] is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promisor did not assent".[40] Admittedly, courts require B to know[41] of A's mistake, but this cannot be the sole pre-condition of contractual invalidity.[42]

Finally, it is admitted that promisor/promisee objectivity is not mutually exclusive and that different circumstances might encourage one or other method to be employed. Spencer, for example, argued that "promisee objectivity" is the norm but was subject to two exceptions: where the promisee knew of the promisor's mistake and, more significantly, where the promisee acted in a way which contributed to the promisor's mistake.[43] The problem here is that B knows of A's mistake and specifically acts in a way which preserves A's mistaken impression. If this led to reliance upon promisor objectivity then, following *Cundy* and *Ingram*, where A's subjective intentions manifestly dominated, A would invariably succeed in cases of mistaken identity.

**Shogun: Applying an objective test**

In *Shogun*, a precise definition of "objectivity" did not emerge in any of the speeches, but it seems reasonably clear that the majority of their Lordships avoided the adoption of a purely party-based perspective.[44] Rather, the consensus of opinion suggested a more detached form of objectivity, based on how a reasonable person would view the circumstances,[45] a pragmatic solution which avoids the problems of transposing the terminology of promisor/promise into a factual setting where the rogue may be either the offeror *or* the offeree.[46] However, this represents only part of the solution. Having identified the standpoint from which objectivity is assessed, it is then necessary to decide the object of the exercise: to whom or to what is the test to be applied?

Unfortunately, at this point, any semblance of unanimity disappeared. Lord Nicholls shunned any attempt to discern, in more than a limited sense,[47] the intention of the innocent seller: "what matters is *whether* [A] agreed to sell his goods to the person with whom he is dealing, not *why* he did so or under what name." [48] Lord Millett, in agreeing with Lord Nicholls, sought to find an objectively verifiable correlation between the offer and the acceptance.[49] Evidence of A's intention, however clear, was of little consequence when objectively determining the presence of offer and

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39 *Note Boulton v Jones (1857) 2 H & N 564 (to be discussed later) where it remains a moot point whether B truly appreciated the mistake that A was making, especially with regard to knowledge of A's set-off against the previous owner of the shop, although the report in (1857) 6 WR 107 might suggest otherwise.*

40 *(1871) LR 6 QB 597, 610. This analysis was fully supported by Professor Goodhart, op cit at 231.*

41 *Cf Hartog v Colin & Shields [1939] 3 All ER 566.*

42 *See The Unique Mariner (No 2) [1979] 1 Lloyd's Rep 37 for a perfect illustration of how B's knowledge, viewed objectively, emphasised the unilateral nature of A's mistake, rather than the existence of the mistake itself.*

43 *Op cit, Spencer, especially at 106-7.*

44 *Cf Lord Nicholls [2003] UKHL 62; [2003] 3 WLR 1371 at [10] who seems to intimate that objectivity should be assessed through the eyes of A.*

45 *See, for example, Lord Walker, ibid at [183].*

46 *Compare Boulton v Jones (1857) 27 LJ Ex 117 and Cundy v Lindsay (1878) 3 App Cas 459.*

47 *[2003] UKHL 62; [2003] 3 WLR 1371 at [10] where Lord Nicholls states that "for the purpose of deciding whether a person had the necessary intention to enter into a contract with the crook, a person's intention is considered more narrowly. It is assessed by reference to what he believed the position to be."*

48 *Ibid at [28].*

49 *Ibid at [97].*

acceptance.[50] Lord Hobhouse steadfastly refused to conduct any "factual enquiry into extraneous facts not known to both of the parties".[51] As the parties had entered a written contract, the parol intentions of the parties had no bearing on the identification of the parties as this had become a question of documentary construction. Lord Phillips's approach was very different: "The object of the exercise is to determine what each party *intended*, or must be deemed to have *intended*", deducing such intentions "from their words and conduct".[52] Finally, Lord Walker seemingly favoured the approach taken by Lord Phillips, but attempted to reconcile all of the above views:

> *"The objective nature of the enquiry tends to narrow [the difference] between the person for whom the offer or acceptance is intended and the person to whom it is directed. I venture to suggest that the right question to ask ... is to whom the offer is made (or to whom acceptance of an offer is made)".*[53]

### 3. Objectivity in Dealing or Intention?

The differences of approach advocated by their Lordships were critical to their final decisions. By adopting a restrictive definition of intention, Lords Millett and Nicholls were able to conclude that a hire-purchase contract had been formed between Shogun and the rogue. Offer and acceptance correlated exactly, with evidence of the buyer's fraud going to subsequent remedy rather than initial contract validity. These views find resonance in *Lewis v Averay*,[54] where Lord Denning MR stated:

> *"... we do not look into his intentions, or into his mind to know what he was thinking or into the mind of the rogue. We look to outward appearances."*

Did this mean that A's intention to contract with a particular individual could only be defined by reference to "outward appearances", or that, in assessing such "outward appearances", the supposed intention of A was of secondary importance in determining the identity of the other contracting party? There seems little doubt that Lords Millett and Nicholls embraced the latter interpretation.[55] Thus, whilst espousing the principles of objectivity, any evidence that went to A's state of mind and might assist in the task of identifying his intention, would remain hidden from the reasonable person's evaluation of the offer and acceptance issue (including the reason *why* A entered the contract).[56] On the facts, the actions of Shogun in carrying out credit reference checks and the production of the stolen driving licence by the rogue were presumably irrelevant - such evidence was probative of fraud, and its effect, but could not affect whether Shogun was selling the car to the person in the showroom. Lord Millett's conclusion was that Shogun believed the impostor was the real Mr Patel and that "in that belief it entered into a hiring agreement and authorised the dealer to

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50 *Ibid at [87] where his Lordship supports the approach adopted by Horridge J in Phillips v Brooks [1919] 2 KB 243 of separating the "identity" of the buyer (in terms of offer and acceptance) from evidence of the seller's intention (relevant to the issue of fraud).*

51 *Ibid at [55].*

52 *Ibid at [125] and [170].*

53 *Ibid at [184]. See also Lord Millett at [71] who highlighted the difference between an offer being "intended for" a specific person as opposed to being "directed" to that person. For a fuller analysis of this linguistic minefield, see Williams, Mistake as to Party in the Law of Contract, (1945) 23 Can Bar Rev 271 and 380, especially at 390-2.*

54 *[1972] 1 QB 198, 207.*

55 *Cf [2003] UKHL 62; [2003] 3 WLR 1371 at [152] per Lord Phillips. Note the marked contrast with the approach taken by the Court of Appeal in The Great Peace [2002] EWCA Civ 1407, [2003] 3 WLR 1617, where the parties' intentions, in the context of common mistake, were considered to be of paramount importance: see Chandler, Devenney and Poole, Common Mistake: Theoretical Justification and Remedial Inflexibility [2004] JBL 34.*

56 *[2003] UKHL 62; [2003] 3 WLR 1371 at [29] per Lord Nicholls.*

deliver possession of the car to the customer who had so identified himself."[57] The ensuing contract might be subsequently rescinded for fraud, but the fraud-induced intention to sell could not negative the formation of the contract itself.[58] Indeed, this approach called into question the correctness of the House of Lords' decision in *Cundy v Lindsay* as "objectively speaking there was *consensus ad idem*, though this was vitiated by the fraud which produced it".[59]

The views espoused by Lords Nicholls and Millet are crystal clear. Tortuous analysis of the metaphysical characteristics of identity are seemingly consigned to the preserve of academia. An objective test is being employed primarily to identify whether the physical exchange of offer and acceptance has occurred between the parties, rather than to whether the parties (objectively) intended to make such an exchange. This truncated form of objectivity is directed solely to one aspect of contract formation (namely, what the parties did), circumventing any evidential presumptions that might facilitate a clearer understanding of what the parties intended. A is "treated as intending to contract with the person with whom he is dealing",[60] whether that be the person standing in front of him or the person to whom he is writing. Naturally, this raises the question of the relationship between the principles of offer and acceptance on the one hand and the principles of unilateral mistake on the other. Lord Millett, drawing from the dissenting judgment of Devlin LJ in *Ingram v Little*,[61] advocated a two-stage approach: (i) is there sufficient correlation between offer and acceptance and if so (ii) is the 'agreement' affected by mistake? In relation to the second question, his Lordship was clearly of the opinion that a unilateral mistake as to identity did not render a 'contract' void but rather, as Lord Denning MR had suggested, only voidable.[62]

Returning to the facts of *Cundy v Lindsay*, where A had directed his acceptance to B's address, Lord Millett stated that:

> *"The goods were ordered by Blenkarn posing as Blenkiron & Co. and supplied and invoiced to him in that name. Outwardly the acceptance did correspond with the offer".*[63]

Thus, the name proffered by B appears irrelevant, representing a mere "label" by which a person can be identified, as transient as an address or occupation.[64] Rather, what matters is the physical transmission of the acceptance to the person who ordered the goods - a seductively uncomplicated approach, but does it provide the required level of predictability? Lord Nicholls certainly showed no inclination to add any further refinements to the "dealing" test: once the owner of goods had agreed to part with ownership of those goods on the basis of a fraudulent misrepresentation, a contract had been formed, albeit voidable in nature. However, this suggests that if B fraudulently intercepts and thereupon accepts an offer from A to C then a contract nevertheless ensues. The physical transmission of offer and acceptance has occurred between A and B, with B's fraud simply leading A to believe that he is still dealing with C. Such a conclusion would clearly undermine the role of objectivity in determining whether an outwardly intended exchange of offer and acceptance

57 *Ibid at [107].*

58 *Ibid at [6] per Lord Nicholls.*

59 *Ibid at [97]. See also [108]-[109] where Lord Millett specifically calls for the House to overrule its decision in Cundy v Lindsay, a view which is also adopted by Lord Nicholls at [34]-[35].*

60 *Ibid at [81] per Lord Millett (emphasis added). The same test was used by Lord Nicholls when re-considering the facts of Cundy v Lindsay, at [28] and [31].*

61 *[1961] 1 QB 31.*

62 *See Lewis v Averay [1972] 1 QB 198, 206-207. Quaere the circumstances, if any, in which a contract could be voidable in Equity on the ground of mistaken identity; cf Beatson, Anson's Law of Contract, 28th edn., (Oxford University Press, Oxford, 2002) at 345-347, and Huyton SA v Distribuidora Internacional de Productos Agricolas SA [2003] EWHC 2088.*

63 *Ibid at [97]; see also [34]-[35] per Lord Nicholls.*

64 *Lord Phillips supported this view, ibid at [120].*

had occurred.[65] Lord Nicholls' approach also suggests that the decision in *Boulton v Jones*,[66] is now to be doubted. The facts were that the defendant had ordered goods from Brocklehurst, prompted by an existing set-off for that amount. Unfortunately, Brocklehurst had sold his shop, that day, to the plaintiff. The Court of Exchequer ruled that the defendant had sent an offer to Brocklehurst which therefore could not be accepted by the plaintiff. Applying Lord Nicholls' test would inevitably lead to the formation of a contract as the parties had physically corresponded with one another. Certainly there was no suggestion that the plaintiff had *fraudulently* intercepted the defendant's offer to Brocklehurst.[67]

Perhaps the above analysis led to Lord Millett's positive support for the decision in *Boulton v Jones*. His Lordship commented that as the goods had been "ordered from Brocklehurst but supplied and invoiced by Boulton; the acceptance did not correspond with the offer".[68] Thus, according to Lord Millett, in *Cundy* A was *dealing* with B, where the recipient was named as C but operated from B's address, whilst in *Boulton* A was *dealing* with B, where the order was sent to B at C's address.[69] Can this apparent conflict be reconciled? One possible argument is that the two cases demonstrate the importance of first identifying whether the rogue is the offeror or offeree, a point rarely mentioned in *Shogun*.[70] In *Cundy*, the court's attention was focussed on the offeror's identity – the offeree simply accepted the offer from the rogue, sending it back to the address given. Conversely, in Boulton, it was the offeree's identity that was at issue – the offeree purported to accept an offer directed to a differently named person.[71] Lord Millett sought to circumvent this difficulty by suggesting that as the plaintiff, in *Boulton*, could not accept an offer addressed to another person, his remittance of the order represented a counter-offer which the defendant accepted in the mistaken belief that it was made by Brocklehurst.[72] With respect, this interpretation is equally difficult to sustain as it is clear that the defendant had no knowledge of any change of the shop's ownership until after he had consumed the goods. Surely no contract can be formed where A makes an offer to B, which is countered by C[73] and then mistakenly accepted by A? In conclusion, we are left with the distinct impression that the "dealing" test advocated by Lords Nicholls and Millett retains the capacity for producing unpredictable decisions, with Lord Nicholls' version offering a more workable solution provided clearer guidance is given on such issues as fraudulent interception, and the *comparative* relevance of B's personal details where A has wrongly addressed his offer or acceptance either in terms of the named recipient or stated address.

In contrast to the above, Lords Phillips and Walker adopted a more traditional analysis in which divining A's apparent intention would determine with whom the offer and acceptance had taken place. In the words of Lord Phillips, where two people had reached an agreement, "the court asks the

65 *Lord Millett, ibid at [63], noted that a physical transmission of offer and acceptance would not create a contract where a fraudulent interception of the offer or acceptance had taken place.*

66 *(1857) 2 H & N 564.*

67 *Cf Cheshire, Mistake as Affecting Contractual Consent, (1944) 60 LQR 174, 185, who argues that the facts demonstrated that the plaintiff had acted negligently in the circumstances.*

68 *[2003] UKHL 62; [2003] 3 WLR 1371 at [97]. Arguably, the real question should have been whether an offer sent to a shop, but addressed to a named individual, could reasonably be supposed to be addressed to that individual or to the owner of that shop at the time the offer was received.*

69 *Note that Lord Millet's test would ignore any facts that went to A's intention; eg in Boulton, that A was unaware that C now operated from B's old address or that his reason for placing the order was the existence of a set-off against Brocklehurst. Support for this analysis can be found in Williams, op cit at 388-90.*

70 *See, however, Lord Hobhouse's analysis at [47] where the nature of credit transactions and the role of the rogue, as offeror, is an important consideration.*

71 *[2003] UKHL 62; [2003] 3 WLR 1371 at [70].*

72 *Ibid at [96].*

73 *Quaere if this is possible.*

question whether each *intended*, or must be deemed to have *intended*, to contract with the other".[74]

It is at this point that some members of the academic fraternity might lick their lips with delight, confident in the belief that the pursuit of "intention" necessarily leads the court back to an investigation of why A considered B's identity to be so fundamental,[75] why the difference between B and C was so crucial to the ensuing contract,[76] and how one might characterise the relevant totality of B's identity.[77] However, their Lordships managed to avoid any incursion into such sterile territory. Lord Phillips simply concentrated on "deducing the intention of the parties from their words and conduct,"[78] an approach fully supported by Lord Walker who concluded that Shogun evidenced a clear intention to accept the offer seemingly made by the real Mr Patel.[79] The relevant intention was not based on the importance of B's identity but rather on the manifest conduct of A. In short, instead of focusing on *why* A intended to deal with B, the enquiry is redirected towards *how* A demonstrated this intention, rendering superfluous any separate body of rules for unilateral mistake of identity. Nevertheless, the fact that one party had mistaken the identity of his co-contractor might remain an important factor in assessing intention within the more appropriate context of contract.[80]

In summary, Lords Phillips and Walker clearly relied on the same form of objectivity at the contract formation stage as employed by courts to deduce the terms (and meaning) of an ensuing contract, or even when applying the remoteness test to the assessment of damages for breach of contract: in each situation, the outward intentions of the parties remain a primary constituent of objectivity. However, the germ of unpredictability, particularly in face to face dealings, remains. Lord Phillips admits as much when recognising that "the innocent party will have in mind, when considering with whom he is contracting, both the person with whom he is in contact and the third party whom he imagines the person to be".[81] Lords Phillips and Walker sought to resolve this potential conflict between physical evidence and apparent intention by clarifying and strengthening existing evidential presumptions with regard to *inter praesentes* and *inter absentes* dealings. It is this development which, it is respectfully argued, will truly result in the jettisoning of the more esoteric "mistake of identity" jurisprudence.

## 4. Face to face dealings

The presumption that A intends to deal with B where negotiations have been conducted face-to-face can be traced back to the speech of Lord Penzance in *Cundy v Lindsay*.[82] Although no explanation for this presumption was immediately forthcoming it seems superficially justifiable for

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74 *[2003] UKHL 62; [2003] 3 WLR 1371 at [125].*

75 *Eg Phillips v Brooks [1919] 2 KB 243 and Lewis v Averay [1972] 1 QB 198. In both cases A's mistake about the creditworthiness of B was not considered sufficiently fundamental to invalidate the contract.*

76 *Traditionally it has always been thought essential that C, the party with whom A thought he was dealing, does actually exist; eg King's Norton Metal Co v Edridge Merrett & Co Ltd (1897) 14 TLR 98.*

77 *Cf Treitel, The Law of Contract, 11th ed (Sweet & Maxwell, London, 2003), at 302, who rightly observes that it is quite possible that A believes that C's whole identity is represented by some "identifying attribute" (eg membership of a particular college).*

78 *See [2003] UKHL 62; [2003] 3 WLR 1371 at [170]. Lord Phillips also drew upon prior case law that had relied upon objective intention: see, for example, [127], [129], [133], [135], [138], [141].*

79 *Ibid at [191].*

80 *Ibid especially at [123]-[125]; see also The Hannah Blumenthal [1983] 1 All ER 34 and The Leonidas D [1985] 1 WLR 925.*

81 *Ibid at [153].*

82 *(1878) 3 App Cas 459, 471-472. Cf the earlier decision in Hardman v Booth (1863) 1 H & C 803*

at least three reasons: (i) to all outward appearances the process of offer and acceptance has been concluded physically between A and B,[83] (ii) to some extent, A's argument that B's identity was of critical importance is less convincing if he (A) does not know what B looks like,[84] and (iii) as there were only two primary means of communicating at the time of *Cundy*, by post or orally, there was an apparent logic in identifying one of those mediums as being more, or less, susceptible to a finding of mistake.[85] Nowadays, of course, there is a multiplicity of communication channels available, even to the average consumer. Thus, in *Shogun*, Lord Millett questioned why other types of quasi-physical communications should not also be included in the presumption; for example, conversations held over the telephone or via the use of some form of televisual link:

> *"If the offeree's words of acceptance are taken to be addressed to the physical person standing in his presence who made the offer, what is the position where they deal with each other by telephone? Is the disembodied voice to be equated with physical presence?"*[86]

There is clearly considerable merit in this suggestion.[87] The existing presumption may be predicated on the physical immediacy of the parties but in the age of videophones and GPS satellite communications' technology the distinction between *inter presentes* and *inter absentes* loses some of its meaning. Nor can it be argued that physical presence gives A an opportunity to ask for some form of immediate identification from B, perhaps impractical during telephonic or televisual communication. Leaving aside the ubiquitous fax machine (employed in *Shogun*), physical proof of identity is not the basis upon which a court would assess A's *intention* to deal with B, nor can it affect whether A *directed* his offer to B. Regrettably this matter was left unresolved as their Lordships proceeded on the basis that they were dealing with a written contract. Nevertheless, as the rogue was physically present in the car showroom, but dealt with the finance company via fax, one may conclude that any fundamental extension in the definition of "face to face" was implicitly rejected.[88]

With regard to the presumption itself, none of their Lordships suggested its abolition. Indeed, Lord Millett's arguments seemingly rendered it conclusive for, by emphasising the "dealing" test, it necessarily followed that in face to face dealings there was only one person that A could be dealing with, the person in front of him. If further justification was needed, his Lordship persuasively argued that,

> *"there is surely nothing to be said for resorting to a rebuttable presumption in order to resolve a question of fact [ie dealing] which is incapable of being determined by the evidence. If there is no test by which the question can be answered on the evidence, there is none by which the Court can determine whether the presumption has been rebutted."*[89]

On the other hand, Lords Phillips, Nicholls and Walker preferred to strengthen the presumption,

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*where the issue of face to face dealings was seemingly irrelevant.*

83 *Eg Phillips v Brooks [1919] 2 KB 243.*

84 *See, however, Hardman v Booth [1863] 1 H & C 803, where the presumption was successfully, albeit implicitly, rebutted.*

85 *Leading texts have consistently suggested that operative mistake was easier to establish where the parties had dealt with each other inter absentes; see, for example, Cheshire, Fifoot & Furmston, Law of Contract, 8th ed, (Butterworths, London, 1972) at 230 and the similar comments in the 14th ed (2001) at 280.*

86 *[2003] UKHL 62; [2003] 3 WLR 1371 at [69]; cf Entores v Miles Far East Corp [1955] 2 QB 327 at 332 per Denning LJ.*

87 *Lord Nicholls, ibid at [36], preferred to extend the face to face presumption to all types of communication, including contracts concluded by written correspondence; see also Lord Millett at [70].*

88 *See, for example, Lord Phillips at [170] and Lord Hobhouse at [51]. Lord Walker, at [81], suggested the possible extension of the presumption to telephonic negotiations, but certainly no further.*

89 *Ibid at [67].*

struggling to find a suitable example where the presumption[90] could, in practice, be rebutted, although Lord Walker did mention the celebrated story of the fraudulent Tichborne claimant who resorted to physical disguise in order to give the impression that he possessed a certain type of historical family resemblance.[91] Lord Nicholls summed up the general mood by saying,

> *"The factual postulate necessary to bring the presumption into operation is that a person (O) believes that the person with whom he is dealing is the person the latter has represented himself to be. Evidence that the other's identity was of importance to O, and evidence of the steps taken to check the other's identity, will lead nowhere if the transaction proceeds on the basis of the underlying factual postulate."*92

The face-to-face presumption now seems to verge on the irrebuttable and we can be reasonably confident that the esoteric distinctions of identity and attributes drawn in *Ingram v Little*,[93] *Hector v Lyons*,[94] *and Lake v Simmons*,[95] will no longer be repeated. This then leaves us with the issue of contracts in writing.

## 5. Written correspondence and written contracts

In *Shogun* Lord Millett forcefully argued that, in principle, there should be no distinction between agreements concluded *inter praesentes* and agreements concluded *inter absentes:*[96]

> *"...in truth the distinction was always unsound. If the offeree's words of acceptance are taken to be addressed to the physical person standing in his presence who made the offer, why is the contract entered into by correspondence different? Why is the offeree's letter of acceptance not taken to be addressed to the physical person who made the written offer which he is accepting? The offeree addresses the offeror by his assumed name in both cases. Why should this be treated as decisive in the one case and disregarded in the other?"*[97]

Nevertheless, the majority of their Lordships in *Shogun* were of the opinion that when an agreement was in writing,[98] the identification of the parties was a matter of construction. This

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90 *Lord Hobhouse did not consider the presumption as the facts demonstrated a written contract concluded inter absentes; however, ibid at [51], he implicitly accepts the utility of the face to face presumption.*

91 *See [2003] UKHL 62; [2003] 3 WLR 1371 at [187], an interesting paragraph on different forms of deception.*

92 *Ibid at [37].*

93 *(1988) 58 P & CR 156, where a test of "direct and important materiality" was proposed by Sir Nicholas Browne-Wilkinson V-C (as he then was).*

94 *Note that in Lake v Simmons [1927] AC 487 it was only Viscount Haldane's obiter comments (especially at 500-1) that suggested the contract between the original parties might have been void for mistake.*

95 *Cf Lord Hobhouse, in Shogun [2003] UKHL 62; [2003] 3 WLR 1 371at [47], stated that in a consumer credit transaction the identity of the customer is "fundamental to the whole transaction" as it is essential to the checking of the credit rating of the borrower.*

96 *See also Lord Nicholls, ibid at [26]-[34]. Even Lord Phillips was "strongly attracted" to such an argument, at [170].*

97 *[2003] UKHL 62; [2003] 3 WLR 1371 at [70]; see also [28] per Lord Nicholls.*

98 *Quaere whether, in this context, the majority in Shogun considered written contracts to include those formed via the use of e-mail and fax. Lord Walker, ibid at [188], suggested they did and this is supported by other authorities; see, for example, Derby & Co Ltd v Weldon (No.9) [1991] 2 All ER 901 and Pretty Pictures v Quixote Films Ltd [2003] EWHC 311 at [11].*

approach seemed to mimic the application of the, so-called, parol evidence rule.[99] The apparent simplicity of this approach does, however, mask a number of issues.

First, what is the position where A and B deal *inter praesentes* and make use of written documents?[100] Presumably, if the relevant documents do not make reference to the parties to the putative contract, the situation will be treated as a face-to-face dealing and the relevant presumption applied. By contrast, where the relevant documents do purport to identify the parties to the putative contract, presumably the construction approach will be appropriate if the documents were intended[101] to represent the agreement, or where, although not containing all of the terms, they included some terms and identified the parties.[102] This appeared to be the view of the majority of their Lordships in *Shogun*.[103]

Secondly, to what extent, if any, can extrinsic evidence be used in the construction process?[104] If it is accepted that a name is essentially a label,[105] there is considerable merit in Lord Millett's argument that:

> *"...once it is established that the person whose name and other personal details are stated in the contract and the person who stated them and signed the contract are not the same, the question immediately arises: which of them should be treated as the counterparty? Do the name and other details included in the contract refer to the person to whom they belong or to the impostor who included them in order to identify himself?...To say, as my noble and learned friend, Lord Hobhouse of Woodborough, does, that it is a question of construction which admits of only one answer, with respect simply begs the question."*[106]

There was, however, a divergence of opinion amongst the majority as to the extent to which it was permissible to use extrinsic evidence in the construction process. In respect of *inter absentes* dealings Lord Hobhouse adopted a restrictive approach, essentially only admitting extrinsic evidence where there was ambiguity or to establish that a person had signed as an agent.[107] His Lordship, however, did make an exception in respect of pseudonyms and this would presumably explain *King's Norton Metal Co Ltd v Edridge, Merrett & Co.*[108] This approach appears consistent with the long established principle that in relation to written contracts intention is to be ascertained by reference to the language used,[109] but there is some support in the case law, at least

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99 *See [2003] UKHL 62; [2003] 3 WLR 1371 at [49] per Lord Hobhouse, [154] per Lord Phillips and [188] per Lord Walker. Note that the Law Commission was of the opinion that the 'rule' was based on the intentions of the parties: see Law of Contract: The Parol Evidence Rule (Law Com No. 154, Cmnd. 9700, 1986). As such, their Lordships did not distinguish between situations where there was a written contract and contracts concluded by written correspondence, an approach consistent with that of the Law Commission, at 2.18.*

100 *In Shogun it was argued that the dealings took place inter praesentes through the 'agency' of the dealer. Lords Hobhouse and Walker thought that the dealer was not Shogun's agent and this seems consistent with Branwhite v Worcester Works Finance Ltd [1969] 1 AC 552. Lord Phillips had more difficulty with this point: see [176].*

101 *Cf Allen v Pink (1838) 4 M & W 140.*

102 *See Law Commission Report, Law of Contract: The Parol Evidence Rule (Law Com No 154, Cmnd 9700, 1986), at 2.19.*

103 *[2003] UKHL 62; [2003] 3 WLR 1371 at [49] per Lord Hobhouse, [166] per Lord Phillips and [192] per Lord Walker.*

104 *Fraud and mistake are, of course, exceptions to the parol evidence rule: see Pickering v. Dowson (1813) 4 Taunt 779 and Raffles v Wichelhaus respectively.*

105 *Ibid [120] – [122] in which Lord Phillips provides an illuminating discussion of the nature of names.*

106 *Ibid at [103].*

107 *Ibid at [49]. See also Dumford Trading AG v OAO Atlantrybflot (May11th, 2004, unreported); cf Campbell Discount Co v Gall [1961] 1 QB 431.*

108 *(1897) 14 TLR 98.*

109 *Cf Lewison, The Interpretation of Contracts, 2nd ed, (Sweet & Maxwell, London, 1997), at 7-8.*

in this context, for a less restrictive approach. For example, in *Cundy v Lindsay*[110] there is a suggestion that the result might have been different if Lindsay had not known of Blenkiron's operations.[111] For this reason Lord Phillips[112] was prepared to admit "appropriate" extrinsic evidence, although there is little discussion of when such evidence might be "appropriate".[113] Lord Phillips did, however, state that:

> *"...a person carrying on negotiations in writing can, by describing as one of the parties to the putative agreement, an individual who is unequivocally identifiable from that description, preclude a finding that the party to the putative agreement is other than the person so described. The process of construction will lead inexorably to the conclusion that the person with whom the other party intended to contract was the person thus described."*[114]

Thirdly, to what extent would a different result be reached where a formal written contract resulted from the parties having dealt face to face? This issue had already been addressed by the Court of Appeal in *Hector v Lyons*,[115] but the decision now commanded the closest scrutiny by their Lordships in *Shogun*. The facts were that the plaintiff, a Martin Aloysius Handel Hector, negotiated, *inter praesentes*, the purchase of a house from the defendant. At all times the defendant understood that she was dealing with the plaintiff. However, for reasons which are not entirely clear, when the formal contract was being drawn up the plaintiff instructed the solicitors to name his son, Martin Aloysius Handel, as the purchaser. The plaintiff then signed the contract but not with his normal signature. Subsequently, the plaintiff, claiming to be the purchaser, sought to enforce the contract. The action was rejected and the appeal dismissed, apparently on the ground that the purchaser was Mr Hector junior.[116] In dismissing the appeal Sir Nicholas Browne-Wilkinson V-C, referring to the principles governing oral contracts, stated:

> *"In my judgment the principle there enunciated has no application to a case such as the present where there is a contract and wholly in writing. There the identity of the vendor and of the purchaser is established by the names of the parties included in the written contract."*[117]

In *Shogun* Lord Hobhouse characteristically approved the decision and the reasoning in *Hector v Lyons*. Lord Walker thought that *Hector v Lyons* did not help the defendant in *Shogun* but stopped short of approving the decision. By contrast, Lord Phillips admitted to having:

> *"...difficulty in understanding the basis on which the trial judge concluded that the purchaser described in the contract was the son rather than the father. The father has carried out the negotiations, he had signed the agreement, albeit not with his customary signature, and he bore the forenames and the surname of the purchaser, as described in the contract."*[118]

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110 *(1878) 3 App Cas 459.*

111 *See also Boulton v Jones (1857) 27 LJ Ex 117, 118, per Bramwell B.*

112 *Lord Walker appeared to adopt a similar approach to Lord Phillips; see [2003] UKHL 62; [2003] 3 WLR 1371 at [188]-[192].*

113 *In Shogun there were relatively few problems in discerning intention; see, for example, Lord Hobhouse at [48].*

114 *[2003] UKHL 62; [2003] 3 WLR 1371 at [161]. Quaere on this approach why the knowledge of Lindsay and Co was relevant in Cundy v Lindsay; perhaps because the goods were addressed and dispatched to "Messrs Blenkiron & Co, 37 Wood Street" whereas the firm was called 'W Blenkiron & Son' and carried on its business at 123 Wood Street.*

115 *(1988) 58 P & CR 156.*

116 *There is some doubt whether this aspect was actually appealed: cf Shogun at [101] per Lord Millett and [166] per Lord Phillips*

117 *(1988) 58 P & CR 156, 159.*

118 *[2003] UKHL 62; [2003] 3 WLR 1371 at [166].*

Later in his speech Lord Phillips appeared to move further from the position of Lord Hobhouse when distinguishing dealings which were *exclusively* in writing from dealings where there was some "personal contact":

> *"Where there is some form of personal contact between individuals who are conducting negotiations, this approach [identifying intention from words and conduct] gives rise to problems. In such a situation I would favour the application of a strong presumption that each intends to contract with the other, with whom he is dealing. Where, however, the dealings are exclusively conducted in writing, there is no scope or need for such a presumption."*[119]

The irony here is that Lord Phillips appears to be using the "dealing" test advocated by Lord Millett; a test which emphasises the physical communication of offer and acceptance rather than the intention which lies behind that communication, typically epitomised by the name of the addressee. Perhaps in practice the difference between the approaches adopted by Lords Millett and Phillips is not as unbridgable as we have suggested?

Finally, prior to *Shogun* it was generally assumed that in order for a 'contract' to be void for mistake of identity it would need to be shown that A "took all reasonable steps to verify the identity of the person with whom he was invited to deal."[120] Is this still relevant in the light of *Shogun*? The 'dealing' test' proposed by Lords Nicholls and Millett would render such considerations redundant.[121] By contrast, Lords Phillips and Walker focused, as we have seen, on *how* A demonstrated his intention and what better way of doing this than by checking C's identity? Provided that any written evidence was not conclusive on this matter, it would seem logical to assume that the more precautions A takes, the more likely that a reasonable person will believe that A, on objective grounds, intends to deal with C not B. Does this mean that the *inter absentes* presumption of Lords Phillips and Walker *might* be rebutted where A does not make any checks? Certainly it is interesting to observe that the judges[122] who were impressed by Shogun's processes found for the claimant whereas those who ignored the claimant's investigative processes, or were positively scathing about them,[123] found for the defendant.

## 6. Conclusion

The approaches adopted by Lords Millett and Nicholls, or by Lords Phillips and Walker, are equally defensible[124]. Fundamentally, the issue remains one of identifying the parties. In *Cundy* it is perfectly justifiable to conclude that as the acceptance was sent to B's address, a contract between A and B resulted. Conversely, as the goods were sent to a differently named party (C) it is equally valid to suggest that no contract between A and B occurred. Neither conclusion requires recourse to the metaphysical aspects of a person's identity, but only one can prevail if the common law is

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119 *Ibid at [170] (emphasis added).*

120 *Cheshire, Fifoot & Furmston, Law of Contract, 14th ed, (Butterworths, London, 2001) at 280; cf. Hardman v Booth [1863] 1 H & C 803.*

121 *Overall the approach of Lords Nicholls and Millett was influenced by the view that X is more innocent than A: see [35] and [82]. Cheshire, op.cit at 187, also assumes that A is normally more negligent than X. However, Lord Walker cogently argued that it is not clear that X will always be more innocent than A: see [182]. Indeed in Shogun the assistant recorder thought that Mr Hudson had acted "carelessly": see [2001] EWCA Civ 1000 at [3].*

122 *Lords Phillips and Walker: see [178] and [191] respectively.*

123 *Sedley LJ: [2001] EWCA Civ 1000, [2002] QB 834 at [12].*

124 *Although the approach of Lords Millett and Nicholls might make European harmonisation easier: see [2003] UKHL 62; [2003] 3 WLR 1371 at [86].*

to retain the required level of certainty. Asking whether A intended to deal with B, or physically directed his offer or acceptance to B, are simple linguistic variations on the same theme; that is, who are the parties? Either test can be used, or misused, to reach artificially convenient solutions, but whether this leaves us in a better position than previously remains a moot point at present.

Undoubtedly the speeches in *Shogun* will become important touchstones for any future development in cases involving mistaken identity. The importance of adopting a detached form of objective factual analysis will continue to weaken the stranglehold that *Cundy v Lindsay* has imposed on this area, even if the majority in *Shogun* did not see fit to overrule the actual decision. Moreover, the prominence given to the rules of offer and acceptance, linked with the strengthening of presumptions with regard to *inter praesentes* and *inter absentes* dealings, should discourage any future judicial examination of the difference between a person's attributes and identity. But a considerable amount of uncertainty remains, especially with regard to the 2:2 split over the central issue of what overriding test is most appropriate for resolving issues of mistaken identity. It is indeed ironic that having largely substituted the mechanistic rules of contract formation for the, hitherto, more rarefied rules of mistaken identity, lower courts presented with similar facts will struggle to find authoritative statements of principle that commanded the support of the majority in *Shogun*.